IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

and

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor-Respondent.

No. 555.

COLUMBIA BROADCASTING SYSTEM, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and MUTUAL BROADCASTING SYSTEM, INC.,

Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.

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Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the Association of National Advertisers, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae.* Written consent of all parties to the litigation has been obtained.

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted on behalf of the Association of National Advertisers, Inc., a non-profit membership corporation of the State of New York, in opposition to regulation 3.104 of the order of the Federal Communications

Commission at issue before this Court in the above-captioned litigation, which regulation reads as follows:

> "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

This brief is filed with the written consent of all parties to the litigation.

The Association of National Advertisers, Inc., comprises 316 members representing manufacturers and service organizations located throughout the United States, whose common interest is the use of national advertising as a vehicle for the orderly marketing of their goods, wares, merchandise and services. Its membership comprises large national advertisers as well as small and medium-sized national advertisers, some of whom are large users of radio broadcast advertising, some medium or small-sized users of radio advertising, many potential users of that medium of advertising, and some do not use or anticipate using radio at all.

The Association of National Advertisers, Inc. is the only organized voice of the national advertiser[1] and exists for the following purposes:

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[1] According to compilations made by the Publishers Information Bureau and Broadcasting Magazine, members of the Association of National Advertisers placed with the networks 72% of gross business of the networks in 1940.

"The objects of the Association shall be the safeguarding of the essential values in advertising as an instrument for inducing sales; the elimination of waste and inefficiency in the process of distributing goods, wares and merchandise; the furtherance of the science of advertising and marketing; and the promotion of the common interests and welfare of its members, as buyers of advertising, and otherwise." [Constitution, Article III]

ARGUMENT

POINT I

Regulation 3.104 is invalid unless enacted by the Commission pursuant to the requirements of public convenience, interest or necessity.

It is necessary to the validity of regulation 3.104 that it have been enacted pursuant to the requirements of public convenience, interest or necessity. This is true whether it stems from an exercise by the Commission of its power to enact special regulations as to chain broadcasting [Section 303(i) of the Communications Act of 1934] or of its licensing powers [Communications Act of 1934, Sections 307 and 309].

The power of the Commission to act under either of these statutory provisions is limited expressly to the requirements of public convenience, interest, or necessity.

These are terms of definite meaning. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933); *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2nd) 91, 100 (C. of A., D. C., 1937); *Texas, et al.* v. *United States, et al.*, 292 U. S. 522,

531 (1934); and *New York Central Securities Corporation* v. *United States, et. al.*, 287 U. S. 12, 24, 25 (1932). As such they define the limits of the Commission's authority. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra; Heitmeyer* v. *Federal Communications Commission, supra; United States* v. *American Bond & Mortgage Co, et al.*, 31 F. (2nd) 448 (D. C. N. D. Ill., E. D., 1929).

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority."
>
> *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138 (1940).
>
> "The Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.'"
>
> *Ibid*, at page 145.

Furthermore, even though regulation 3.104 may have been enacted pursuant to Section 303(i) of the Act, it does no more than establish in advance a rule for the manner in which the Commission shall at a later date exercise its licensing power. It carries no sanction or penalty other than adverse execution of the Commission's licensing functions. "The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." *Columbia Broadcasting System, Inc.* v. *United States et al.*, 316 U. S. 407, 418 (1942). "• • • they [the regulations] presently determine rights on the basis of which the Commission is required to withhold licenses

and authorized to cancel them; * * *" *Ibid*, at pages 421 and 422.

By their nature, then, these are rules for the exercise of the Commission's licensing powers, and, as such, they must be subject to the same delimitations of authority as are inherent in such powers. If the licensing power must be limited to and exercised for the public convenience, interest or necessity, self-adopted rules of the Commission as to its manner of employing its authority cannot serve to vitiate the jurisdictional restriction that Congress has seen fit to impose upon it. Delegated powers cannot be enlarged by the delegate through its enactment of rules which would permit a wider latitude than originally granted.

When the Commission grants, rejects, modifies or revokes a license, it must do so in obedience to the standards for such action which Congress has established. It cannot rewrite them or disregard them under the guise of adhering to its own regulations. In short, the Commission cannot pull itself up above its Congressionally defined powers by the bootstraps of its own "rule-making" power.

Any regulation enacted by the Commission beyond the framework of its delegation is a usurpation of powers not conferred upon it by Congressional grant, and consequently void. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra; United States, et al.* v. *Baltimore & Ohio Railroad Co. et al.*, 293 U. S. 454 (1935); *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48 (1922).

It is the proper subject of judicial review to determine whether the Commission in enacting regulation 3.104 acted within or without the scope of authority (sometimes referred to as "quasi-jurisdiction") delegated to it by Congress.

Thus, in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., supra,* Mr. Chief Justice HUGHES, writing for the Court, stated at 289 U. S. 276 and 278:

> "Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass."
>
> . . . . . .
>
> "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power."

POINT II

Regulation 3.104 is invalid unless:

1. **There is a finding by the Commission that the public convenience, interest or necessity requires its enactment; and**
2. **Such finding is supported by substantial evidence.**

Where Congress delegates regulatory authority to an administrative agency and provides in the enabling statute for some condition prerequisite to the right of the delegate to exercise such power, no act of the agency in pursuance thereof is valid unless the condition prerequisite exists and is expressly found to exist by the agency as the basis for its action.

This principle has been restated frequently by this learned Court.

In *United States et al.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 (1942), Mr. Justice DOUGLAS, delivering the opinion of the majority, wrote at pages 488 and 489:

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States*, 282 U. S. 194, 215, the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order'. And see *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511. Congress has made a

grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied; then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command'. *Opp. Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 144."

And in *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454 (1934), which involved the validity of a regulation by the Interstate Commerce Commission, under the Boiler Inspection Act, requiring certain equipment on locomotives, the Court stated the basis of its holding in the following language at pages 462 and 463:

"The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound. The Act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem

desirable. The operation of an engine, however equipped, involves some 'danger to life or limb.' At common law the carriers were 'free to determine how their boilers should be kept in proper condition for use without unnecessary danger.' *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529. And the Act conferred authority to prescribe by rule specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb.' The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, *The Chicago Junction Case*, 264 U. S. 258, 263-265, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194."

A cogent restatement appears in the opinion written by Judge LEARNED HAND for a three-judge court in *Baltimore & O. R. Co., et al.* v. *United States*, 22 F. Supp. 533, 536, 537 (D. C., N. D. N. Y., 1937):

"The purpose of findings in such cases is to enable the Courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute."

* * * * * * *

"The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in Florida v. United States, 292 U. S. 1, 54 S. Ct. 603, 78 L. Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. 'Jurisdiction' is a treacherous word;

> we are not clear that the Commission's jurisdiction is not involved; but in any event in United States v. Baltimore & Ohio R. R., 293 U. S. 454, 464, 55 S. Ct. 268, 272, 79 L. Ed. 587, it was expanded to "'quasi-jurisdictional', which was meant to cover all 'indispensable' facts; and in United States v. Chicago, Milwaukee, St. Paul & P. R. R. Co., 294 U. S. 499, 504, 55 S. Ct. 462, 464, 79 L. Ed. 1023, the phrase, 'basic or quasi-jurisdictional facts' was substituted, as in Morgan v. United States, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

In *Missouri Broadcasting Corporation* v. *Federal Communications Commission*, 68 App. D. C. 154, 94 F. (2nd) 623 (1937); *Heitmeyer* v. *Federal Communications Commission*, *supra*; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2nd) 554 (C. of A., D. C., 1938), *certiorari denied*, 305 U. S. 613; and *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission*, 96 F. (2d) 564 (C. of A., D. C., 1938), orders of the Commission were reversed and remanded for lack of suitable findings by the Commission as to the basic facts necessary to sustain their validity. A full review of the principles requiring such findings as prerequisite to validity of administrative action will be found in the opinion of the *Saginaw* case at 95 F. (2nd) pages 560 and 561.

The necessity of adequate findings to support administrative action exists even where the agency acts in its quasi-legislative, as contradistinguished from its quasi-judicial, capacity, if the empowering statute establishes some prerequisite to the exercise thereof.

This appears clearly from the holding in *United States v. Baltimore & Ohio R. Co., supra,* where an order of the Interstate Commerce Commission requiring the equipment of locomotives of a certain class with power reverse gears after a certain future date was set aside for lack of a finding by the Commission that the absence of such gears on such locomotives would constitute an "unnecessary peril to life or limb."

Quite clearly the enactment of this rule by the Interstate Commerce Commission was an exercise of its quasi-legislative function, as it established a new rule of general application looking toward the future. A finding of the existence of the conditions prerequisite to the right of the Commission to exercise such quasi-legislative power was nevertheless held necessary, and its absence rendered the rule void.

Of course, where Congress has established no condition precedent to an administrative body's authority to exercise a legislative function, no such finding is necessary to the valid exercise thereof, as there is no "indispensable fact" which need be found. *American Telephone and Telegraph Co. et al.* v. *United States et al.*, 14 F. Supp. 121 (D. C. S. D. N. Y., 1936) *affirmed*, 299 U. S. 232 (1936).

If the Communications Commission enacted regulation 3.104 in the exercise of its licensing power under Sections 307 and 309, the requirement of a finding of the basic facts necessary to the validity thereof, including that of public convenience, interest or necessity, is clear. *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, at pages 276, 277 and 278 (1933). *Heitmeyer v. Federal Communications Commission, supra; Missouri Broadcasting Corporation* v. *Federal Communications Commission, supra; Saginaw Broadcasting Co.* v. *Federal Communications Commission, supra;* and *Tri-State Broad-*

casting Co., Inc. v. *Federal Communications Commission, supra.* The provisions of Section 402(e) of the Communications Act of 1934 providing that on appeal from an order of the Commission made under its licensing powers "* * * findings of fact by the Commission, if supported by substantial evidence shall be conclusive * * *" clearly impose such a requirement.

If, on the other hand, regulation 3.104 was enacted by the Commission pursuant to Section 303(i) of the Act, the power to do so thereunder is also made expressly dependent upon a pre-existing requirement of public convenience, interest, or necessity.

If made under Section 303(i) of the Act, regulation 3.104 is subject to judicial review in the same manner as orders and regulations of the Interstate Commerce Commission under the Urgent Deficiencies Act. Section 402(a) of Communications Act; *Columbia Broadcasting System* v. *United States, et al., supra.* In addition, the same duty is expressly impressed upon the Communications Commission as upon the Interstate Commerce Commission, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises" [Communications Act of 1934, Section 404; Interstate Commerce Act, Section 14(1)]. The wording of the provisions in the two Acts is identical each with the other in this respect. It was therefore clearly the Congressional intent that the report and findings of the Communications Commission, and the scope of judicial review of its orders, be the same and subject to the same principles as have attached to those of the Interstate Commerce Commission under the corresponding statutory provisions.

The following language and holding of this Court in *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S.

454, 465 (1934), is, therefore directly applicable: "It is true that formal and precise findings are not required under § 14(1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. *But § 14(1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity.*" (Italics added.)

Equally applicable is the following excerpt from the opinion in *Dubois, et al.* v. *Central R. Co. of New Jersey, et al.*, 22 F. Supp. 469, 472 (D. C., D. N. J., 1938):

> "In Beaumont, S. L. & W. Ry. Co. v. U. S., 282 U. S. 74, 86, 51 S. Ct. 1, 6, 75 L. Ed. 221, the court made the following comment: 'Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. Wichita R. R. v. Public Utilities Commission, 260 U. S. 48, 58, 43 S. Ct. 51, 67, L. Ed 124. And we have recently emphasized the duty of such courts fully to state the grounds upon which they act. Virginian Ry. v. United States, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463; Lawrence v. St. Louis-San Francisco Ry., 274 U. S. 588, 591, 592, 47 S. Ct. 720, 71 L. Ed. 1219; Arkansas Commission v. Chicago, R. I. & P. R. Co., 274 U. S. 597, 603, 47 S. Ct. 724, 71 L. Ed. 1224; Hammond v. Schappi Bus Line, 275 U S. 164, 171, 48 S. Ct. 66, 72 L. Ed. 218; Cleveland, C., C. & St. L. Ry. v. United States, 275 U. S. 404, 414, 48 S Ct. 189, 72 L. Ed. 338; Baltimore & Ohio R. Co.

v. United States, 279 U. S. 781, 787, 49 S. Ct. 492, 73 L. Ed. 954.'

"The Commission's failure to make adequate findings of fact was again held to render its order void in U. S. v. Chicago, M., St. P. & R. Co., 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023. In this case the Commission wrote a long and discursive report, concluding with a statement that the proposed rates which the Commission disapproved would be unreasonable and in violation of section 1(5), which denounces unreasonable charges. Nevertheless, the court in an opinion by Mr. Justice CARDOZO held the order void for lack of adequate findings, because 'This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co. (January 7, 1935), 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587.' 294 U. S. 499, 504, 55 S. Ct. 462, 465, 79 L. Ed. 1023.

" 'The statement in the second of these paragraphs that the proposed rates would be "unreasonable" must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated,' 294 U. S. 499, 506, 55 S. Ct. 462, 465, 79 L. Ed. 1023.

"The case of Florida v. United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291, sheds furthers light upon the requirement that the Commission make appropriate findings. The court made the following observation: 'The question is not merely one of the absence of elaboration of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (The Beaumount, Sour Lake & Western Railway Company v. United States, 282 U. S., p. 74, 51 S. Ct.

1, 75 L. Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. *The Commission is the fact finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.'* 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291. (Italics supplied.)

"Accordingly, it appears that the first inquiry to be determined is whether or not the report of the Commission is supported by findings of fact."

POINT III

There is no finding by the Comission that the public convenience, interest, or necessity required enactment of regulation 3.104.

In the case at bar the Commission's regulation 3.104 is not supported by any findings. The Commission has made no findings of fact at all, and its order enacting the regulation sets forth none.

The only pronouncement by a majority of the Commission which comes anywhere near being an administrative finding is Chapter IX of its "Report on Chain Broadcasting" which appears under the caption "Conclusion."

It is respectfully submitted that this pronouncement does not constitute the findings of fact requisite to a valid exercise by the Commission of its regulatory powers that due process demands.

The chapter of the report captioned "Conclusion" consists of nothing more than argumentative assertions and the statement of bare opinions entertained by a majority of the Commission. Nothing more is needed to establish their complete lack of the characteristics of definite and precise factual findings prerequisite to valid administrative regulation than the language in which they are couched and with which most of them are introduced. Many of them, for example, are qualified by the words "we believe". Elsewhere we find such statements as: "we subscribe to the view that * * *"; "we doubt that * * *"; "we are under no illusion that * * *"; and, "* * * the steps now taken may perhaps operate as * * *".

Statements such as these are far too speculative, vague, indeterminate and conclusory to satisfy the requirements of proper findings.

> "It is to be noted, at this point, that the Commission has narrowed the case down to one question, *i. e.*, Was the applicant financially qualified? Our inquiries, therefore, are similarly narrowed to a consideration of the three italicized paragraphs of the 'Statement.' Upon them the Commission's decision must stand or fall. Do they contain findings of fact, and, if so, are such findings supported by substantial evidence? Generally speaking, the three paragraphs consist of a more or less indiscriminate commingling of arguments, speculations, statements of fact, narrative recitals of testimony, and conclusions of law. Taken as a whole, they cannot be said to constitute findings of fact such as are contemplated by the statute. Necessarily, therefore, they provide a highly unsatisfactory basis for appeal, and thus defeat the purpose of the statute; which is to inform the parties and this court of the reasons for the Commission's action, with that high degree of certainty

which may properly be expected from a group of administrative experts such as constitute the Communications Commission. Boss, et al. v. Hardee, 68 App. D. C. 75, 93 F. 2d 234, decided September 20, 1937."

Heitmeyer v. *Federal Communications Commission*, 95 F. (2nd) 91, 96 (C. of A., D. C., 1937).

Most significant of all, perhaps, as indicating that the regulations at issue are born of the Commission's desire to experiment rather than the product of a definite finding of fact that they are in the public interest is the sentence reading, "If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry."

The conclusion is inescapable that the Commission has deliberately refrained from making a finding that these regulations are required by public interest, convenience or necessity, since, at this stage and until the Commission has carried out its experiment, it has no basis for finding (as contradistinguished from believing or theorizing) that such is the true fact.

"Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency." Mr. Justice CARDOZO in *United States, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, 294 U. S. 499, 511 (1935).

POINT IV

There is no substantial evidence to support a finding by the Commission that regulation 3.104 is in the public convenience, interest, or necessity.

Assuming, *arguendo*, without conceding, that Chapter IX of the Commission's "Report on Chain Broadcasting", which bears the heading "Conclusion", is a statement of the findings of a majority of the Commission, we respectfully submit that there is no substantial evidence to support that portion thereof which is necessary to the validity of regulation 3.104.

(If no finding by the Commission were necessary as to the quasi-jurisdictional fact that regulation 3.104 is required by the public convenience, interest or necessity, the following portions of this brief would nevertheless be applicable in support of our contention that as a matter of fact the said regulation is not required by the public convenience, interest or necessity and that, consequently, as a matter of law it is enacted without the framework of the powers delegated to the Commission by Congress. These are separate legal propositions, although the arguments in support of each may coincide.)

The first stated conclusion of the Commission, and we assume from its preeminent position that it is deemed by the Commission to be of prime importance, is "that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio."

With this as the premise, it obviously and inescapably follows that anything operating to destroy the network system of broadcasting runs counter to the public interest.

Section 3.104, therefore, is, by the Commission's own conclusion, in derogation of the public interest unless it does not impair the network system of broadcasting. There is no evidence to support a finding that the said regulation will not have such an adverse result. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *New England Divisions Case*, 261 U. S. 184, 203, 204; *Keller* v. *Potomac Electric Power Co., supra*; *Chicago Junction Case*, 264 U. S. 258, 263, 265; *Silberschein* v. *United States*, 266 U. S. 221, 225; *Ma-King Products Co.* v. *Blair*, 271 U. S. 479, 483; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 30; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 654; *Crowell* v. *Benson*, 285 U. S. 22, 49, 50."

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277 (1933).

The only pertinent conclusion expressed by the Commission appears in the following language:

> "The prophecy that regulations such as we are adopting will 'result in the eventual destruction of national program service' and 'destroy the American system of network broadcasting' is, we believe, the

exaggeration of advocacy. The practices which we find contrary to public interest were instituted to restrict competition within the broadcasting field, not to protect commercial broadcasting from competition by other types of advertising. Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing." (Commission's Report, p. 88.)

The record is barren not only of substantial evidence, but even of a scintilla of evidence, to support any finding that wholesale destruction of radio stations' freedom to contract for time options will not deal a damaging blow to network broadcasting. All that we have in this record is the bare "belief" expressed by the Commission as a "conclusion", and its "doubt * * * that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated." No factual evidence of any kind whatever supports it.

To the contrary, common knowledge and experience well accepted in the field of advertising, merchandising and distribution, and the generally known past experiences of the broadcasting industry itself, establish that *the network system of broadcasting is dependent upon the ability of the networks to obtain options for radio time from their affiliates.* Despite the fact that these economic considerations,

inherent in the placement of advertising contracts, easily could have been ascertained upon inquiry by the Commission, the Commission nevertheless issued no invitation to the advertising community, as represented by buyers of radio advertising, to present evidence to the Commission.[1]

A

The "Option" in Regulation 3.104 is Not an Option

Regulation 3.104 upon its face contains misleading language. It pretends to permit "options" when options in fact are prohibited, except in favor of networks as against local merchants. The "options" which purportedly the local broadcast stations may give to networks, turn out to be nothing but verbiage, for the grant of the right of option is immediately destroyed by the provision that such "options" may not be exclusive as against other network organizations and may not prevent or hinder the stations from "optioning" or selling any or all of their time, to other networks. Thus, the only "option" is the "option" of the "optionor", so far as the networks are concerned. This point is emphasized for the reason that for all practical purposes the present regulation 3.104, amended by the Commission after supplemental hearings, is the same in its application to networks as the original regulation 3.104, which prohibited options entirely. Comprehension of that fact is essential to an understanding of the practical impact of that section upon the business of national advertising.

[1] Commission's Report, page one.

B

Regulation 3.104 Promotes Monopoly by Permitting Concentration of Buying Power

The regulations at issue, in so far as they relate to methods of placing business with radio broadcast stations, concern themselves exclusively with "options" (Sections 3.102 and 3.104). There is no rule delimiting the right to enter into contracts for radio time, either by a network, a national advertiser, an advertising agent, or by any one else. From this omission springs the vice in regulation 3.104.

The Commission has found that of the 660 licensed stations in the United States, 30 only of such stations have clear channels of 50,000 kilowatts operated on an unlimited schedule (Commission's Report, p. 31). Those thirty stations are the most powerful in the United States (Commission's Report, p. 32).

Charts prepared by an advertising expert and offered before the Senate Committee on Interstate Commerce[1] on June 18, 1941, show that 100% of the population of the United States could be reached through the use of only 64 radio stations at a time cost of $12,015.00, whereas a second advertiser wanting to use the same time on the air would have to use 160 different stations at a cost of $14,788.00, but would only be able to reach 84.1% of the population of the United States; a third advertiser wishing to use the same time would have to use 191 stations and be content with a maximum of 67.2% of the population of the United States at a cost of $12,965.18. Thus it would appear that

[1] Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-Seventh Congress, First Session, on S. Res. 113, June 2 to 20, 1941, pages 458, 475, 511, 512.

inevitably competition among purchasers would be keenest for the use of the thirty most powerful stations, or for the 64 radio stations comprising the best coverage of the United States, for the simple reason that of the possible combinations for nationwide coverage above set forth, the cheapest and most conveniently obtainable would be comprised of the best stations.

It is common knowledge in the advertising business, and is well known to the Association of National Advertisers, that plans presently are under consideration to enter into just such time contracts if regulation 3.104 is held to be valid.

The reason for such a trend is quite apparent. Many large national advertisers have a great investment in good-will represented by consumer acceptance of given programs at given hours. It is only natural that they should wish to preserve the good-will inherent in these listening habits at a minimum of cost. Thus, when contracts for the best stations have been entered into, a lesser opportunity will be offered to the remaining radio stations throughout the country, as well as a lesser opportunity to the remaining national advertisers. Under existing conditions, no national advertiser is so enabled to monopolize the market, for according to the charts cited, *supra*, he would be obliged to purchase time on stations affiliated with at least three different networks in order to get time on all of those stations.

If it be true, as found by the Commission that:

> "Since a national network must have outlets in the more important markets of the country, it is readily apparent that exclusive network affiliation contracts severely limit the number of national networks which may do business" (Commission's Report, p. 51),

it is doubly true that the ability of national advertisers—or more exactly, the ability of a few large and powerful national advertisers—to contract for the key stations of the country would substitute for the four highly competitive existing nationwide network organizations a monopolistic network of the larger stations.

An even greater hazard is presented in the power to monopolize inherent in the ability of a few large advertising agencies (whose operations will be discussed *infra*) to tie up the most desirable radio facilities in the United States. 75% of the gross dollar volume of the advertising business of the networks was received in 1940 through ten leading advertising agencies, acting in behalf of their clients.[2] The number of advertising agencies placing a volume of business in all advertising mediums in excess of ten million dollars a year is approximately eight.[3]

C

The Commission's Conclusions Are at War With Commonly-Known Facts

A majority of the Commission has concluded that:

> "Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with

[2] Advertising Age, issue of January 13, 1941; Variety, issue of January 15, 1941.

[3] "Advertising Agency Compensation." Professor James W. Young, (University of Chicago Press, 1933) at page 15.

outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing." (Commission's Report, p. 88.)

This wholly erroneous conclusion of the Commission majority has doubtless led it to the error into which it fell in promulgating regulation 3.104.[1]

It is not engaging in hyperbole to state that there is no one familiar with the processes of national advertising who does not know that the audience to which radio advertising is directed is precisely the same audience to which competitive advertising mediums address their messages. The form of message may differ for one advertising medium or another, but, obviously, the audience to be reached in any given case is always the same, regardless of which medium of advertising is used; that audience in any case is the composite of the consumers which the advertiser wishes to influence towards the purchase of his product or the use of his service. Radio is not a thing apart; its use by the national advertiser is most often a coordination with the use of other advertising mediums, such as newspapers, magazines, and outdoor advertising. The same audience as that now reached by radio was reached by the national advertiser before the advent of radio. A great many advertisers do not use radio at all, but address themselves to the same audience as radio advertisers. A casual glance at a morning newspaper in any fair-sized community will disclose that there are many national advertisers who appeal to the

[1] While the Commission might be presumed to have special competence and knowledge in the field of radio communications, it has no special competence or knowledge in the field of national advertising and should have sought the facts from national advertisers.

public both through the press and through radio. The published statements of those newspapers is ample evidence that they reach audiences as wide as many radio programs in the community, and sometimes reach greater audiences. The same thing is true of outdoor advertising. With a deteriorated efficiency in radio broadcasting, it is axiomatic that newspapers, and other competitive mediums of advertising, would gain at the expense of radio.

The national advertisers can reach their audience if radio is eliminated entirely.

National advertisers, particularly those who make an appeal to the consumer in his home, in formulating their advertising plans, are interested in one thing only, the efficiency of their advertising messages in producing sales at a low cost, with a minimum of waste. They have no concern with the fortunes of a particular medium of advertising, or of the fortunes of the various instrumentalities that comprise that medium, whether it be radio or anything else, except as the facilities obtainable may be used as a tool for the scientific marketing of their wares. The advertiser wants to reach his exact market, to the extent possible.

In that regard, a Harvard report,[2] says:

> "In order to assure profitable operation, management has found it increasingly necessary to know which item or groups of items and which customers or types of customers are profitable, and how effort should be related to the needs of the different items and markets. Good management has found it unwise merely to appropriate funds for advertising

[2] Borden, "The Economic Effects of Advertising" (Irwin, 1942), being a research project of Harvard School of Business Administration, hereinafter referred to as the Harvard Report.

> and selling to be spent over broad territories with a check only on final profit results, for the final profit result, even though favorable, may represent a combination of losses in some markets and profits in others. Moreover, good management recognizes that selling effort should be fitted to the needs of particular markets of a size whose operations can be readily appraised and directed" (p. 131).

This view on the part of national advertisers does not stem from whim or caprice. Each national advertiser is operating in a highly competitive market, and he must so plan his advertising expenditure that a fair return is secured to him from that expenditure; otherwise, he must fall by the wayside. The use of advertising is therefore interwoven into the economic fabric of the nation as a whole.[3] The Commission erred in not seeking to explore these interrelated factors, which are at the heart of the question. It is respectfully urged that, had such an exploration been made, regulation 3.104 would have been quite differently conceived.

D

Regulation 3.104 Will Create Barriers Against the Use of Radio by National Advertisers

Advertising appropriations do not spring full-panoplied from the head of Jove. They result from long and careful preparation, first of the market, and later of the specific advertising theme and its application.

> "After World War I", says the Harvard Report, *supra*; "the larger advertising agencies generally, though not universally, established research departments to make market studies for their clients [na-

[3] "Whatever combination of forces may have been responsible for the remarkable growth of advertising in the past 75 years, there can be no question of its i- -tance in the present economy." Harvard Report, *supra*, at p.

tional advertisers]. Small agencies as a rule did not offer organized research service, however, nor did small clients employ field investigation organizations on any considerable scale. But even for small advertisers employing agencies, the hit-or-miss use of advertising of early days disappeared. *In recent years some attempt to delimit markets, to lay out schedules and copy approach, and to select proper media to reach markets has become an established part of advertising agency work even for the small advertiser, while the studies made for large advertisers are often elaborate.*" (Italics added.) (p.127)

After the market investigation has taken place, the facts thereby developed are fitted into a pattern by trained specialists known as advertising agencies. This pattern may involve the use of one medium of advertising or several, but most commonly it involves a combination of various means of reaching and influencing the public, often to the moment of actual purchase, through such an instrumentality as a window poster or a display on the counter of the merchant.[1] When several mediums of advertising are being

[1] "The work of an advertising agency as described in the Agency Service Standards of the American Association of Advertising Agencies is as follows:

"'Agency Service consists of interpreting to the public, or to that part of it which it is desired to reach, the advantages of a product or service.

"'Interpreting to the public the advantages of a product or service is based upon:

"'1. A study of the product or service in order to determine the advantages and disadvantages inherent in the product itself, and in its relation to competition.

"'2. An analysis of the present and potential market for which the product or service is adapted:
As to location
As to extent of possible sale
As to season
As to trade and economic conditions
As to nature and amount of competition

used concurrently, it logically ensues that the advertising agency coordinates in a common and cohesive pattern the entire advertising "campaign" of the national advertiser, so that the "campaign" in all of its various aspects will "break" in the several markets, or throughout the nation, at the same time, and in the manner planned.

If a high degree of uncertainty should prevail as to the availability of time in such an important medium of advertising as radio broadcasting, or any important part thereof,

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"'3. A knowledge of the factors of distribution and sales and their methods of operation.

"'4. A knowledge of all the available media and means which can profitably be used to carry the interpretation of the product or service to consumer, wholesaler, dealer, contractor, or other factor.

"'This knowledge covers:

Character	
Influence	Quantity
Circulation	Quality
Physical Requirements	Location

"'Acting on the study, analysis and knowledge as explained in the preceding paragraphs, recommendations are made and the following procedure ensues:

"'5. Formulation of a definite plan.

"'6. Execution of this plan:

a) Writing, designing, illustrating of advertisements, or other apropriate forms of the message.

b) Contracting for the space or other means of advertising.

c) The proper incorporation of the message in mechanical form and forwarding it with proper instructions for the fulfillment of the contract.

d) Checking and verifying of insertions, display or other means used.

e) The auditing, billing and paying for the service, space and preparation.

"'7. Cooperation with the sales work, to insure the greatest effect from advertising.'"

Advertising Agency Compensation, by Professor James W. Young (University of Chicago Press, 1933), at pages 3 and 4.

it would become impossible for the advertising specialists to plan with any real foresight how to coordinate the medium of radio with the other mediums desired to serve the needs of the national advertiser. In current practice, it is possible for the advertising agent to keep currently abreast of time available in radio because representatives of the networks, who are constantly soliciting his custom, make it their business to keep him advised day in and day out as to open schedules, which they are enabled to do because of existing options. He can thus plan ahead with assurance, just as he can with other mediums of advertising. (Newspapers and magazines can always expand physically by adding another page. Outdoor advertising has one central source of information to which inquiries may be directed.)[2]

In view of these established, and necessary business practices, it is, therefore, not surprising that a network witness should have testified before the Commission that at a time when his network had been unable to make definite offers of time against a competitor who was able to do so, his network "lost considerable business." (Commission's Report, p. 65.)

It is not clear whether the networks originated the idea of optioning the time of independent standard broadcast stations in order to sustain simultaneous nationwide circulation, or whether the idea came from the advertisers and advertising agencies; it may have been a combination of the two; but regardless of who initiated the option time, *the conclusion is inevitable that the optioning of time of independent standard broadcast stations has brought the*

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[2] Prof. Young, in his book "Advertising Agency Compensation," *supra*, at page 37, says that "this organization of the National Outdoor Advertising Bureau, agency owned, gave all agents who wished to take advantage of it full opportunity to use the outdoor medium. This agency Bureau now places for its agency members over 75 per cent of the total national outdoor business."

medium of radio advertising into harmony with the actual needs of the national advertiser and with his marketing problems. Any claim of restraint of trade which may result from option time must thus be viewed, not as a reaching out of one or more of the networks to foreclose the markets to others, but as an accommodation of business practices in the industry to the reasonable requirements of the buyer.[3]

From the foregoing, it is respectfully submitted that the resultant introduction of uncertainty by regulation 3.104 into the placement of radio advertising would make the use of the advertising dollar less efficient, add to the cost of distribution, and lessen the revenue to radio from advertisers whose combined dollars now support the structure. This view finds historical justification. It is generally known to advertisers that a few years ago the medium of outdoor advertising found itself out of step with present day marketing practices, and faced receivership, until its practices were radically altered to conform with the needs of national advertisers.[4]

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[3] Charles F. Gannon, Radio Director of Erwin, Wasey & Co., wrote in 1932, prior to option time contracts of NBC and Mutual that "Long ago we were introduced to the fact that because stations are listed on a particular network's rate card, it does not follow that the network can always deliver such stations. The individual station, being torn between the desire to sell local time for real profit and to accept chain programs chiefly for prestige, frequently embarrasses one or another advertiser by refusing to move a local program to accomodate the network or vice versa. I rather believe that all commercial stations would be wise and helpful in appointing definite hours when network programs have precedence and other hours reserved exclusively for local and spot programs." (The Advertising Agency Looks at Radio, Appleton, 1932, at p. 60.)

[4] "When changes in the structure of the industry again made it possible for agencies to handle the medium on satisfactory terms, N. W. Ayer & Son promptly acquired membership in the Outdoor Advertising Association of America, Inc." The History of an Advertising Agent, by Hower (Harvard University Press, 1939) at page 198.

E

Regulation 3.104 Will Lessen Competition in the Purchase of Advertising

The fundamental interest of national advertisers is that, in the interest of efficient marketing, there should be free and open competition between the several mediums of advertising for the advertising dollar, just as free and open competition should subsist among producers in their solicitation of the consumer's patronage. This is the settled policy of the Association of National Advertisers, Inc.[1] and is conceived to be in the public interest.

Impediments placed in the path of the access of the national advertiser to the medium of radio obviously contravene the advertiser's best interests, and are therefore opposed.

In contravening the best interests of the national advertiser, however, Section 3.104 of the Commission's regula-

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[1] "With the purpose to make every dollar spent in advertising bring back greater returns as a beginning, the Association of National Advertisers has from year to year enlarged its facilities for service to its members until its operations cover every detail of advertising and marketing with information and counsel. Membership of the Association of National Advertisers is made up of companies. An individual is registered as representative. Eighteen per cent. of the registered representatives are presidents, general managers, vice-presidents or other general executives of their companies; 7 per cent are sales managers; 70 per cent. are advertising managers, publicity directors or directors of sales promotion; 5 per cent. are assistants to various executives. Each year there are two general meetings—one in the East and one in the West—at which there is 'hard-pan discussion of problems in specific terms' and a general exchange of experience. From the files of the Association, from special investigations, and from the general meetings, the more than three hundred members are constantly obtaining information that results in making advertising and allied activities more productive" (The History and Development of Advertising, by Frank Presbrey, and published by Doubleday, Doran & Comany, Inc. 1929), at page 545.

tions, renders a marked disservice to the public interest generally, for the whole structure of radio, with its emergent value to the people and to the Government of the United States[2] is supported by the advertising dollar.

The advertising dollar in radio thus takes on a broader aspect than its purely commercial uses. In this connection, it is interesting to note that in the United States where advertising is the most highly developed, the distribution of radio receiving sets is by far the greatest of any country in the world,[3] from which it may fairly be presumed that advertisers, and the network programs made possible by the advertisers' expenditures, effectively meet the wishes of the great body of the American public. The destruction of network organizations—the inevitable result of the application of regulation 3.104—will, at the same time, destroy the incentive of the national advertiser, and result quantitatively in a marked deterioration of the listening audience.

In a letter cited in a Federal Radio Commission report published in 1932,[4] it was stated: "This [advertising] agency enjoys one of the largest volumes of broadcasting business. In the event of legislative restriction, this business would immediately transfer to other advertising media or would dissolve entirely with extensive loss to themselves, radio networks, and individual stations of the radio busi-

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[2] "Radio constitutes an important factor in defense. Beside serving as a source of news and of entertainment vital to morale, it furnishes the principal channel through which civilian defense authorities disseminate directions and intelligence necessary to the public safety." Collation No. 1, Office of Price Administration, Part 1336.

[3] World Almanac, 1940; Broadcasting Yearbook, 1940.

[4] Commercial Radio Advertising, Senate Document No. 137 (1932).

ness. * * * The first objective of the sane sponsor is to attract the largest possible number of listeners and leave them more pleased than he found them. * * * The millions upon millions of letters emanating from the radio audience would indicate a satisfied state of mind. We are perfectly aware that there are a number of listeners who have registered objections. We believe these people belong to a class known as 'ready letter writers' * * * I believe the best programs that money and genius can develop constitute the structure of sponsored broadcasting which is *per se* the best broadcasting today." The question at that time before the Commission was the extent of advertising to be permitted by radio.

The same report of the Commission shows that the networks provided a wide variety of sustaining and sponsored programs, including symphonic music, literature, lectures in economics, Government, history and biography, discourses on world affairs, geography, travel, social welfare, and current news, womens' hours, childrens' hours, market and weather reports, etc.

It is certainly no exaggeration to say that in the welding of national morale at the time of the sneak attack on Pearl Harbor, no physical instrumentality was as valuable as radio in bringing to the whole people the imminent peril to the Nation.

It is true that the Commission pays lip service to the network concept. However, having enunciated that underlying principle, it proceeds, by regulation 3.104, to destroy the very principle which it enunciates. It is amazing that it should have reached such argumentative and summary conclusions as those set out *supra*, without inquiring into the

processes of national advertising and their relation to the networks.[5]

All of the primary private parties to this litigation recognize the necessity of "time" options. The record shows that even the broadcasting system which has intervened in this case on the side of the Commission filed a petition with the Commission to seek amendment to the original regulation 3.104, which prohibited time options entirely. It is respectfully submitted that regulation 3.104, as amended, though somewhat more wordy in language, is, from the viewpoint of network operation, the same as the original regulation 3.104.

Commenting on the Commission's Committee report on "Monopoly" in the Public Opinion Quarterly, issue of September, 1940, published by the School of Public Affairs of Princeton University, Professor C. J. Friedrich of Harvard College,[6] says that "the report is one-sided in that it features those aspects of broadcasting which contain

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[5] "The value of networks organization is inestimable from the point of view of programs * * * Individual stations could not afford to duplicate the quality and variety of network programs * * * There can be little doubt that network organization is essential to a good system of broadcasting * * *

"The development of networks was logical once public interest in radio passed beyond the stage of curiosity in a novelty * * * Moreover the efficiency of network broadcasting appealed to the advertisers. With the increased cost of broadcasting, the stations themselves felt the need for some cooperative action such as could be provided by network connections. In consequence of this combination of forces the national networks assumed a dominant position in the broadcasting structure." Rose, "National Policy for Radio Broadcasting (Harper, 1940) at pages 62, 63, 64 and 65. (This writing is a committee report of the National Economic and Social Planning Association.)

[6] Director of the Radio Broadcasting Research Project at the Littauer Center of Harvard University under a grant from the Rockefeller Foundation.

monopolistic practices of the chains, while neglecting those aspects which reveal the chains as strengthening competitive elements * * * The development of the chains has produced, over wide areas of the United States fierce *competition* for listener attention between the chains * * *

"In this connection it deserves mention that the report suffers from an inner contradiction in that it seeks to maintain that the networks have, as a result of their monopolistic power, come to control the programs of their outlets, and at the same time have surrendered their control over programs to advertisers"[7] * * * "Unless all signs deceive, the result of breaking up the networks would be the retailing of national programs to local stations by advertisers on terms even less favorable than those now provided by the networks, because such a procedure would be very costly for the advertising agencies. The tendency of listeners might well be to tune in to a few powerful stations of national scope, with consequent concentration of revenue in the hands of these few stations. There is a tendency in this direction anyway. One wonders to what extent the networks have been retarding it and thus have been helping to keep a considerable number of local stations going.

"This problem of number of stations is becoming pressing in the face of radio broadcasting in wartime."

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[7] That advertisers generally have given the public what it wants to hear is shown in Ten Years of Network Program Analysis, published by the Cooperative Analysis of Broadcasting (1939), which sets forth, *inter alia*, that Fred Allen had an initial audience-listening rating of 6.3%, but reached 20% after fourteen months of broadcasting; Lux Radio Theatre, had an early rating of 8.4%, which after fifteen months went above 20%; Charlie McCarthy climbed from a rating of 13.7% to a rating of 42.3%; Jack Benny rose from a 17.6% rating to a 35.7% rating (pp. 104 and 105).

F

The Commission Assumes Expert Qualifications in a Field Foreign to its Expert Knowledge

It might strongly be urged that the Commission's judgment should not be set aside when it has acted properly in a field in which it was legislatively created to function and in which it is, therefore, presumed to possess expert qualifications.

The essential facts relied upon in this brief, however, are drawn from and supported by generally accepted writings and source materials in the field of advertising, marketing and distribution. They are the product of common knowledge and experience in those fields and the proper subject of judicial notice.

Pertaining, as the facts do, to the advertising, marketing and distribution of commodities and services, they relate to a field separate and apart from that in which the Commission may be presumed to possess expert competence. As to those matters the Commission has but lay knowledge. There is no reason to presume, and no statutory basis for holding, that the Commission has been constituted an authority in these fields, or that this Court is foreclosed from taking into consideration upon this appeal the product of accepted knowledge and experience therein.

CONCLUSION

It is respectfully submitted that the order of the Federal Communications Commission should be set aside.

Respectfully submitted,

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.